

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-7018

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

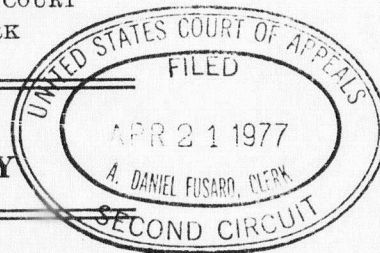
J. GORDON EDWARDS, Ph.D., THOMAS H. JUKES, Ph.D.,
ROBERT H. WHITE-STEVENS, Ph.D.,
Plaintiffs-Appellees,
—against—

NATIONAL AUDUBON SOCIETY, INC.,
ROBERT S. ARBIB, JR., ELVIS J. STAHR, JR.,
Defendants,

THE NEW YORK TIMES COMPANY and ROLAND C. CLEMENT,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**REPLY BRIEF FOR APPELLANT
THE NEW YORK TIMES COMPANY**



CAHILL GORDON & REINDEL
Attorneys for Defendant-Appellant
The New York Times Company
80 Pine Street
New York, New York 10005
(212) 825-0100

Of Counsel:

FLOYD ABRAMS
EUGENE R. SCHEIMAN
RUTH D. MACNAUGHTON

INDEX

	<u>Page</u>
ARGUMENT—	
I. The Judgments against The New York Times Company Should Be Reversed for Lack of Clear and Convincing Proof of Actual Malice	2
II. The Erroneous Rulings of the Trial Court that the <u>Times</u> Article Was Libelous <u>Per Se</u> and that Evidence Demonstrating the Contrary Was Inadmissible Require Reversal	8
CONCLUSION	10

Table of Authorities

Cases:

<u>Buckley v. Littell</u> , 539 F.2d 882 (2d Cir. 1976), <u>cert. denied</u> , 97 Sup.Ct. 786 (1977)	7, 8
<u>Carson v. Allied News Co.</u> , 529 F.2d 206 (7th Cir. 1976)	n.6
<u>Guam Teachers' Local 1581 (AFT) v. Ysrael</u> , 492 F.2d 438 (9th Cir.), <u>cert. denied</u> , 419 U.S. 872 (1974)	n.6
<u>Hotchner v. Castillo-Puche</u> , No. 76-7479 (2d Cir., March 23, 1977)	2, 6, 7
<u>Miami Herald Pub. Co. v. Tornillo</u> , 418 U.S. 241 (1974)	n.2
<u>New York Times Co. v. Sullivan</u> , 376 U.S. 254 (1964)	n.2, 4, 5
<u>St. Amant v. Thompson</u> , 390 U.S. 727 (1968)	3, 4
<u>Time, Inc. v. Pape</u> , 401 U.S. 279 (1971)	2

Book:

B. Schmidt, Jr., <u>Freedom of the Press vs. Public Access</u> (1976)	2
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The constitutionally impermissible errors of the trial court in entering judgments against the Times for its accurate reporting of charges made against plaintiffs by officials of the National Audubon Society are discussed at length in our main brief; we limit this brief to replying to the few assertions made in the answering brief of plaintiffs-appellees and to discussing the applicability of the ruling

of this Court in Hotchner v. Castillo-Puche, No. 76-7479
(2d Cir., March 23, 1977).*

I

THE JUDGMENTS AGAINST THE NEW
YORK TIMES COMPANY SHOULD BE
REVERSED FOR LACK OF CLEAR AND
CONVINCING PROOF OF ACTUAL MALICE

In Part I of our main brief (pp. 21-29), we set forth at length the case law, commencing with Time, Inc. v. Pape, 401 U.S. 279 (1971), affording special protection to the press in cases such as this — cases involving accurate reporting of charges made against public figures by third parties. We there demonstrated that these authorities were dispositive of the instant case, given the fact, as found by the jury and Judge Metzner (207a), that the Times article of August 14, 1972 accurately reported the charges made by Audubon officials in the "Foreword" to the April 1972 issue

* We do not deal in this brief with plaintiffs' submission that their First Amendment rights would be infringed if the Times were to prevail. (Plaintiffs' Brief, pp. 13-16.) Plaintiffs' quarrel as to this issue is not with the Times but with New York Times Co. v. Sullivan, 376 U.S. 254 (1964) itself — its theory and application. Plaintiffs' reliance upon the views of Professor Barron is, in any event, surely misplaced in light of the unanimous rejection of those views by the United States Supreme Court in Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974). See, B. Schmidt, Jr., Freedom of the Press vs. Public Access 234 (1976).

of American Birds and in the telephone conversation of Robert S. Arbib, Jr., the Audubon editor, with John Devlin, the Times reporter. We submitted that under Pape and many subsequent cases, this finding of accuracy precluded any judgment of actual malice against the Times.

This submission is unrebutted by Plaintiffs' Brief, which does not even purport to deal with the Pape line of cases but rather ignores all these cases and instead cites, out of context, a single sentence from St. Amant v. Thompson, 390 U.S. 727, 732-33 (1968), to the effect that "[n]othing referred to by the Louisiana courts indicated an awareness by St. Amant of the probable falsity of Albin's statements about Thompson." (Plaintiffs' Brief, p. 8.)

Plaintiffs' reliance on this citation is entirely misplaced, even apart from the fact that St. Amant was decided prior to Pape and the lower court decisions following it. The sentence quoted by plaintiffs was addressed to a factual situation bearing no resemblance to that of this case. In St. Amant, the allegedly defamatory statements ("Albin's statements about Thompson") had been quoted by the defendant, a candidate for public office, in a televised campaign speech attacking the activities of various public officials and labor leaders. (390 U.S. at 728-29.) In the present case, by contrast, the Times merely reported the Audubon charges without espousing the statements or asserting their truth. Whatever may be the responsibility

of a political candidate such as the defendant in St. Amant for the underlying truth of charges he quotes in support of his own political ends (and the Supreme Court found him not so responsible under the facts before it), it is a separate question, obviously beyond the scope of the St. Amant decision, whether a newspaper may be held responsible for accurately reporting a responsible public figure's charges against another public figure in the belief they are newsworthy, taking no position as to the truth of such charges.

Our main brief further demonstrated that even in the absence of the special protection for the press under Pape and subsequent cases, judgment against the Times could not be sustained because the evidence submitted by plaintiffs did not prove, much less clearly and convincingly as required by New York Times Co. v. Sullivan, supra, that the Times article was published with actual malice in the sense of reckless disregard for the truth. (Main Brief, pp. 30-39) Plaintiffs' only response to this showing, apart from references to precisely the same elements of the scanty record in this case which are shown in our main brief to be insufficient to sustain a judgment against the Times, is a discussion of the actual malice standard which we do not believe is well based in either case law or theory.

For the first time since this action was commenced in April 1973, plaintiffs appear to characterize the Times.

article of August 14, 1972 as a "knowingly false" publication. (Plaintiffs' Brief, p. 11.) This characterization is in direct conflict with plaintiffs' prior position as well as with other statements in their brief. At trial, counsel for plaintiffs stated that of the two types of actual malice distinguished in New York Times Co. v. Sullivan, supra, -- knowing falsity and reckless disregard for the truth -- only the latter was being alleged against the Times (Tr. 407). Likewise, at the outset of that portion of plaintiffs' brief which is addressed to the Times, the charge against the Times is described in terms of reckless disregard. (p. 6) In addition, any charge of knowing falsity which plaintiffs now purport to make against the Times cuts directly against their arguments with respect to the Audubon defendant, Roland Clement, to wit, that Clement was the source of the Audubon charges printed by the Times and that he ratified those charges in his letter to the Times of August 14, 1972 (Plaintiffs' Brief, pp. 16-22). Finally, Judge Metzner himself, in upholding the jury verdict against the Times, held that "it cannot be said that the Times knew that the statements in the story were false." (211a) Clearly, in light of this holding as well as plaintiffs' prior and continuing reference to reckless disregard as the governing standard, plaintiffs may not now be heard to claim "knowing" falsity.

Plaintiffs make no attempt to distinguish any of the cases cited by the Times demonstrating that the rigorous actual malice test could not possibly be deemed satisfied here. Their argument that a reporter's denial of "serious doubts" should not automatically insure a verdict in his favor (Plaintiffs' Brief, p. 7) begs the question before this Court.* That the facts of this case simply cannot survive the rigors of the actual malice test is clearly demonstrated, as well, by this Court's recent decision in Hotchner v. Castillo-Puche, supra. There, despite proof of a kind lacking in this case, that in various memoranda and letters, employees of the defendant publisher had expressed concern that the book there at issue might contain libelous passages, impossible to substantiate (see description of the lower court opinion in our main brief, pp. 35-37), this Court held that there was no clear and convincing evidence that the book was published with reckless disregard of the truth. (Slip Opinion at 2528-29.) In so holding, the Court observed:

* Obviously a reporter's denial of doubt will be unpersuasive, if, unlike the present case, there is clear and convincing evidence to the contrary. Two cases where verdicts against defendants were upheld despite their protestations are discussed in our main brief, pp. 37-38 (Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976); Guam Teachers Local 1581 (AFT) v. Ysrael, 492 F.2d 438 (9th Cir.), cert. denied, 419 U.S. 872 (1974)).

"These strict tests may sometimes yield harsh results. Individuals who are defamed may be left without compensation. But excessive self-censorship by publishing houses would be a more dangerous evil. Protection and encouragement of writing and publishing, however controversial, is of prime importance to the enjoyment of first amendment freedoms. Any risk that full and vigorous exposition and expression of opinion on matters of public interest may be stifled must be given great weight. In areas of doubt and conflicting considerations, it is thought better to err on the side of free speech" (Slip Opinion at 2526.)

II

THE ERRONEOUS RULINGS OF THE TRIAL COURT THAT THE TIMES ARTICLE WAS LIBELOUS PER SE AND THAT EVIDENCE DEMONSTRATING THE CONTRARY WAS INADMISSIBLE REQUIRE REVERSAL

Another legal argument simply ignored by plaintiffs is the Times' showing that the trial court erroneously held the Audubon charges reported by the Times to be libelous per se. This Court's recent decision in Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), cert. denied, 97 Sup.Ct. 786 (1977), upon which we based this assignment of error as well as our related argument that error was committed in the exclusion from evidence of accusatory statements published by the plaintiffs during the course of the DDT controversy, is given but a single cursory reference in plaintiffs' brief.

According to plaintiffs, in this case, "there is an absence of the kind of scurrilous exchange of personalized

epithets that characterizes the background of facts in Buckley v. Littell . . ." (p. 13). In fact, the mutual accusations made by Buckley and Littell pale next to many of the extraordinarily harsh charges made by the plaintiffs in reference to their opponents in the DDT debate; there was surely nothing in Buckley rivalling Dr. Edwards' characterization of those with whom he differs in the DDT debate as engaging in a "de facto murder plot" (1169e). (See also our main brief at pp. 6-7 (n.7), 43-46.)

Contrary to plaintiffs' assertion, it is simply untrue that the Times was "determined to re-try the DDT controversy" (p. 12) in seeking the admission into evidence of statements made by the plaintiffs with respect to opponents of DDT. The Times never suggested any such intention, nor have plaintiffs even accused the Times of this before.

Plaintiffs' argument (Plaintiffs' Brief, pp. 11-12) that some material related to the DDT controversy was "admitted into evidence (771e, 1093e, 1096e, 1097e) and was in fact made available to the jury" completely misses the point. Even if some such evidence was admitted for other purposes, it was not admitted for the purpose sought by the Times, to show the context and meaning of the Audubon charges reported in the Times article of August 14, 1972. Moreover, plaintiffs' citation, noted above, of four admitted trial

exhibits is once again inapposite. None of the cited documents were offered to show the nature of the words used in the course of the DDT debate; only one of them was even written by a plaintiff in this action.*

Plaintiffs' characterization of the trial court's ruling that the Audubon charges were libelous per se as "clearly in accordance with New York law" (Plaintiffs' Brief, p. 13), is also far from the mark. As we have previously noted, the teaching of the Buckley case is precisely that pre-Sullivan common law cases are not dispositive of the meaning of an alleged libel. (Times Main Brief, pp. 40-41.) Rather "the determination of what is libelous must also be measured very carefully" in light of First Amendment imperatives. (539 F.2d at 890.)

* Two of the documents, 771e and 1093e, were authored by Clement; the former is the manuscript from which the names printed in the Times article were drawn; the latter, an internal Audubon memorandum entitled "The Question of Liars," was offered to show Audubon's reaction to the Times article. (Tr. 515) The third and fourth documents are letters to the editor published by the Times in 1971, one by Dr. Jukes (1097e) and the other (1096e) by the Executive Director of the Environmental Defense Fund (offered as a preliminary to the letter of Dr. Jukes which responded to it); both were offered by the Times and admitted by Judge Metzner for the sole purpose of showing the Times' lack of ill will toward the plaintiffs. (Tr. 300)

CONCLUSION

For the reasons stated above and in the main brief of the Times, the judgments entered against the Times should be reversed and judgment ordered entered on behalf of the Times.

Respectfully submitted,

CAHILL GORDON & REINDEL
Attorneys for Defendant-Appellant
The New York Times Company
Office & P.O. Address:
80 Pine Street
New York, New York 10005
(212) 825-0100

Of Counsel:

Floyd Abrams
Eugene R. Scheiman
Ruth D. MacNaughton

UNITED STATES COURT OF APPEALS
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- - - - - x

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-against- :

AFFIDAVIT OF SERVICE

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et al., :

Index No. 77-7018

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Defendants-Appellants. :

- - - - - x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ROBERT F. BELLUSCIO, being duly sworn, deposes and
says:

1. I am over the age of 18 years and not a party
to this action.

2. On the 21st day of March, 1977, I served the
annexed REPLY BRIEF FOR APPELLANT NEW YORK TIMES COMPANY
(2 copies) upon:

Charles L. Trowbridge, Esq.
Gifford, Woody, Carter & Hays
14 Wall Street
New York, New York 10005

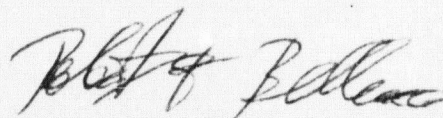
by delivering and leaving true and correct copies thereof at
the office of the above-mentioned attorneys.

3. On the 21st day of March, 1977, I further served
the annexed REPLY BRIEF FOR APPELLANT NEW YORK TIMES COMPANY
(2 copies) upon:

Morris Zweibel, Esq.
Crowe, McCoy, Agoglia, Fogarty
& Zweibel, P.C.
80 East Old Country Road
Mineola, New York 11501

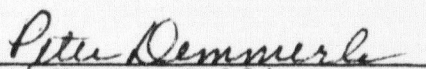
Thomas A. Rothwell, Esq.
Arthur H. Berndtson, Esq.
Rothwell, Cappello & Berndtson
1730 K Street, N.W.
Washington, D.C. 20006

by depositing true and correct copies thereof in the
United States Post Office at 73 Pine Street, enclosed in
stamped, sealed envelopes addressed to the above-mentioned
attorneys.



Robert F. Belluscio

Sworn to before me this
21st day of March, 1977


Notary Public

PETER DEMMERLE
Notary Public, State of New York
No. 31-4640173
Qualified in New York County
Commission Expires March 30, 1979

